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# Robert J. Fleck, Norman A. Nelson, James A Suchala, Richard A. Weber, and Robert Robbins v. National Property Management, Inc., A Utah Corporation, Ski Park City West, A Utah Corporation, Ensign Company, A Limited Partnership, and William S. Richards, Trustee, and the Travelers Indemnity Co : Respondent's Brief

Utah Supreme Court



Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.Wendell F. Bennett; Attorney for AppellantsJohn W. Lowe; Attorney for Respondents

IN THE SUPREME COURT

OF THE STATE OF UTAH

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| ROBERT J. FLECK; NORMAN A. NELSON; JAMES A. SUCHALA; RICHARD A. WEBER; and ROBERT ROBBINS, | : | |
| Plaintiffs-Respondents, | : | |
| v. | : | |
| NATIONAL PROPERTY MANAGEMENT, INC., a Utah corporation; SKI PARK CITY WEST, INC., a Utah corporation; ENSIGN COMPANY, a limited partnership; and WILLIAM S. RICHARDS, Trustee, and THE TRAVELERS INDEMNITY CO., | : | No. 15480 |
| Defendants-Appellants. | : | |

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# RESPONDENTS' BRIEF

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APPEAL FROM JUDGMENT
of the
DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

---

The Honorable J. E. Banks, Judge

JOHN W. LOWE
1011 Walker Bank Bldg.
Salt Lake City, Utah 84111

Attorney for Respondents

WENDELL E. BENNETT
370 East 500 South
Salt Lake City, Utah 84111

Attorney for Appellants

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1011 Walker Bank Bldg.
Salt Lake City, Utah 84111

Attorney for Respondents

WENDELL E. BENNETT
370 East 500 South
Salt Lake City, Utah 84111

Attorney for Appellants

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RESPONDENTS' BRIEF

STATEMENT OF FACTS

Appellants' statement of facts takes two quotes out of context and ignores unfavorable findings of fact made by the court, which are supported by the evidence.

In this action plaintiffs, as contract buyers of unimproved land, seek to recover damages they incurred because of failure of the developers of the area to install streets and utilities. One of the developers, from whom plaintiffs bought, agreed that the improvements would be installed and the other developers gave an indenture and a bond to the county guaranteeing their installation (Ex. 8P).

Time For Performance

Under the indenture furnished,the improvements were to be installed two years from the recording of the final plat. It made no provision whatseover for any extension of time for performance. The quote on Page 3 of appellants' brief combines wording from the indenture and from the bond securing same. In the language of the bond there is the provision that the surety consents to any modifications of the contract which may be agreed upon, including any extensions of time, but that is merely usual suretyship language which permits principals to change the agreement without going back to the surety for its consent. The time for performance of the indenture is clear and fixed. It was two years after the recording of the plat. The court found that the final plat was recorded February 2, 1970 and that "the time for performance of the obligation to install improvements...has expired." (Finding No. 4, Tr. 123) Appellants assert that they are not in default because the bond was not "called." Appellants are erroneously treating the indenture as if it were an agreement to do something upon demand, which it is not.

Appellants then take exactly the opposite tack and state that more than two years had passed prior to the time plaintiffs' Uniform Real Estate Contract was executed, thereby implying that the time for performance of the indenture had expired prior to the time plaintiffs acquired any rights. In so stating appellants ignore the fact that the Uniform Real Estate Contract was an outgrowth of the original obligation evidenced by an earnest money agreement whereby plaintiffs had agreed to purchase the lots. Said earnest money agreement was dated December 29, 1971, prior to the expiration of the two-year period. Appellants also ignore Finding No.11 (Tr.124) which states:

> On December 29, 1971, the date plaintiffs entered into the earnest money agreement whereby they purchased the lots, the time for performance under the performance bond had not expired.

Appellants As Developers

Appellants state that they were in no way involved "with the plaintiffs' land vendor." There is no finding to that effect. The evidence is to the contrary (Tr.167,168). Furthermore, the obvious utlimate fact is that appellants must have been involved with the land developers or they would not have guaranteed the installation of the improvements.

Prior Liens

Appellants state that the developers had placed liens against the entire subdivision, that plaintiffs' interests have been foreclosed and that plaintiffs made no attempt to obtain releases of their land from these liens. Appellants ignore Finding of Fact No.15 (Tr.124) which states:

> Defendants have abandoned their plans to develop the subdivision and to install the improvements. Plaintiffs could have protected their ownership interests as contract buyers against the lien created by Exhibit 6P, and would have done so had the lots had sufficient value. The failure to install improvements caused the lots to have insufficient

value to warrant further investment of funds by plaintiffs, and further investments would have been uneconomic. The abandonment of the subdivision by defendants caused plaintiffs to lose interest in their contract and to lose title to the lots. Plaintiffs' damage accrued prior to the time they determined not to make further investments in the lots and thereby lost title thereto. Plaintiffs minimized their losses by not making any further investment.

## Impossibility of Performance

Appellants state that the planned development has now been entirely changed and that it would now be impossible to install the improvements, and imply that this insulates appellants from damages. Such ultimate conclusions are fallacious for the following reasons.

1. It might be difficult but not "impossible" to install improvements even though it might involve obtaining consent of the new owner.

2. The fact that there is a new owner is a direct result of the failure of the developers to perform under the indenture and bond.

3. Plaintiffs are not seeking specific performance so present inability to perform is immaterial.

## A R G U M E N T

## Plaintiffs are Third-Party Beneficiaries

Travelers contends (p.7) that the indenture and bond, pursuant to which plaintiffs were awarded judgment, should have been construed as being for the benefit of the county only and not for the benefit of interested property owners.

Travelers cites Schwinghammer v. Alexander (1968), 21 U.2d 418, 446 P.2d 414, as authority therefor. That case factually has no relationship to the case at bar. It involved an escrow agreement wherein the lender, Prudential Federal Savings, received for its own protection a deposit to assure completion of a home. The holding of the case was that Prudential had no intent to benefit the home owner as a third party and that the lender, Prudential Federal Savings, was not liable to the owner for allegedly improperly paying the escrowed funds to the contractor. We agree with the statement of law contained therein, that those third parties who are only incidentally benefited without any intention of the promisee that they should have rights, are incidental beneficiaries and cannot sue; but applying the classifications therein stated, plaintiffs here are "donee beneficiaries," not "incidental beneficiaries."

Travelers argues that there is no evidence that Summit County intended that plaintiffs should be third-party beneficiaries. The evidence before the trial court consisted of the indenture and bond (Ex. 8P) and Ordinance No. 58 of Summit County (Ex. 9P).

Ordinance No. 58 under which the bond was required contemplates that the landowners shall be the beneficiaries of the requirements relating to the improvements. The ordinance provides:

> Whenever the subdivider develops a subdivision a portion at a time, such development

> shall be in an orderly manner and in such a way that the required improvements will be continuous and all of the said improvements will be made available for the full effective and practical use and enjoyment thereof by the lessees or grantees of any of the lands subdivided within the time hereinbefore specified.
> Sec. 7B2

The ordinance also reflects that prospective purchasers are being protected in that it requires notice to purchasers of summer home subdivision lots that the usual requirements for subdivisions relating to streets and water have been waived. The ordinance provides:

> For Summer Home Subdivisions that are submitted in accordance with the Summer Home Subdivision provisions of these regulations the following statement shall be required on the final plat; i.e.,
>
> > Notice to Purchaser of Summer Home Subdivision Lots:
> >
> > This subdivision has been approved in accordance with the Summer Home Subdivision provisions of the Subdivision Regulations of Summit County which waive the requirements for the provision of a dedicated public street and reduce the requirements for an approved water supply system to State Board of Health Summer Home Standards for such Water Supply System.
>
> Sec. 5C2

The ordinance further reflects that prospective purchasers are being protected in that it prohibits sale of lots until after compliance with its requirements.

> No street improvements or utilities shall be installed until after approval of the final

plat by the County Surveyor or Engineer. No lots included in such plat shall be purchased, sold, exchanged, nor offered for sale or exchange and no construction of buildings upon such lots shall begin until the final plat is so approved and recorded.
Sec. 5E2

The wording of the indenture and bond is consistent with the obvious objective, which is to guarantee interested parties, including landowners, that the improvements will be put in. The indenture states:

> Principals hereby agree to cause the various improvements...to be installed on or before two (2) years from recordation of the final plats.

The bond recites that it is guaranteeing that principals "will install said improvements." (Ex. 8P)

The trial court made Finding of Fact No. 5 (Tr. 123):

> Plaintiffs, as purchasers of lots in said subdivision, are beneficiaries of the indemnity and performance bond. Said bond was intended for the benefit of purchasers of said lots.

The finding of fact not only is not erroneous, but also is controlling upon this court since this is an action at law for damages.

Travelers argues that it should not be liable because plaintiffs could recover against their seller. This is a non sequitur. Both are liable, but Travelers is solvent.

Travelers argues (p.10) that Summit County is the only proper party plaintiff on the bond and cites four California cases in support thereof.[1] Three of these cases involve a California statute requiring that a bond be furnished. The California courts properly looked at not only the wording of the bond, but at the statute requiring the bond in determining whether or not anyone other than the county was an intended third-party beneficiary. They all concluded that because of the wording of the statute and bond there was no intent that the land owners should have a direct cause of action as a third-party beneficiary. The Morro language, which Travelers quotes, shows that California was determining intent:

> It is the county which is indemnified by the express terms of the bond against loss from 'all cost and damage which... it may suffer' from Westfall's default either in building the roads or in failing to 'fully reimburse and to repay the... county all outlay and expense which... it may incur in making good any...default.' (emphasis added)

We have no quarrel with the result of the California cases considering the wording of the statute and bonds which they were construing. The case at bar is construing language in the bond and ordinance, both of which, when construed together, indicate that a third-party beneficiary is intended to be benefited.

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1 Evola v. Wendt Construction Co. (1959), 17 C.A.2d 21, P.2d 498; Ragghianti v. Sherwin (1961), 16 Cal. Rptr. 538; Morro Palisades Co. v. Hartford Acc. & Indem. Co. (1959) 52 C.2d 397, 340 P.2d 628

In the Morro case the reference to recovery by a third-party beneficiary was only an incidental part of the decision, inasmuch as the county had actually assigned its right to the plaintiff. The court held that the county could not do so, and that one of the landowners should not be in the position of recovering for all damage arising out of failure to perform. Morro was attempting to recover the entire costs of the improvements for himself personally. Plaintiffs here seek to recover only their own damages.

The Evola case held that inasmuch as the ordinance requiring the furnishing of a bond required a performance bond instead of a payment bond, an unpaid supplier was not intended as a third-party beneficiary. Such reasoning implies that, had a payment bond been required, the materialmen could have recovered.

The Ragghianti case follows the Evola case, with the same reasoning.

A fourth California case[2] cited by Travelers was decided, not upon the basis that a third-party beneficiary had no right to sue, but rather upon the basis that a condition precedent had not been met, so that there was no liability under the bond to anyone.

Travelers argues (p.13) that Summit County has not "called for the improvements to be made" and that therefore Travelers should not be liable. The bond expressly provides that improvements

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2 City of Los Angeles v. Meline (1936) 14 C.A. 522, 58 P.2d 690

should be completed by a given date and the court expressly found that the improvements had not been put in and that there was a default. (Findings 3, 4, 6, 8; Tr. 123) When a party has agreed to perform by a given date no demand is necessary. (Bjork v. April Industries (1976)__ U.2d __, 547 P.2d 219)

Travelers argues (p.13) that Summit County has not assigned any of its rights to plaintiffs and that therefore plaintiffs should not recover. The whole concept of a third-party beneficiary's right to sue assumes that there is no assignment.

Travelers cites a Missouri case.[3] That case involved a bond guaranteeing the installation of a sewer system. The court there held that the bonding company was not liable in tort to the landowner for the washing away of his property when the sewer system was not installed. The basis of the decision was that the language of the ordinance and the bond indicated that the bond was not intended to cover the tort, particularly inasmuch as the language expressly stated that the city council could resort to the bond to complete the improvements. The court recognized that had the ordinance and bond reflected an intent to benefit third-party beneficiaries, their rights would be recognized.

The New York supplement case cited by appellant[4] merely held that from the language of the bond it was apparent

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3 City of University City v. Frank Miceli & Sons R & B Co. (Mo. 1961) 347 S.W.2d 131

4 J & J Tile Co., Inc. v. Feinstein (1973) 348 N.Y.S.2d 783 Sp.Ct., App. Div.

that there was no attempt to benefit materialmen and that they were therefore not proper third-party plaintiffs.

Travelers argues (p.14) that the bond does not specifically provide that third parties may recover. Among the many cases that recognize that there need be no specific reference to the right of a third party in order for it to be a third-party beneficiary entitled to recover are Walker Bank & Trust Co. v. First Security Corporation, 9 U2d 215, 341 P.2d 944, 946 in which First Security was held liable to children who sued as third-party beneficiaries under First Security's agreement with the mother of the children, that it would pay premiums upon her life insurance. The life insurance had lapsed, prior to her death, because of the default of First Security. The court said that First Security's "failure to do so renders it liable to the beneficiaries who were harmed thereby despite lack of privity between them."

Another Utah case so holding, and quite similar factually to the case at bar, is Deluxe Glass Co. v. Martin, 116 U. 144, 208 P.2d 1127,1132. In that case it was held that materialmen were protected by a performance bond and could recover as third-party beneficiaries. The position of the bonding company was that inasmuch as the bond furnished was a performance bond rather than a payment bond, guaranteeing payment to the materialmen, the materialmen could not recover as third-party beneficiaries. The court there determined, considering the bond, the statute requiring same, the contract and the common law, that "circuity" of having the promisee sue the surety and then having the promisee protect the owner was to be avoided, and that the materialmen were third-party beneficiaries and could sue the surety even though not referred to in the bond. This court stated:

> It is not always quite clear what is meant when the courts say that the 'intention' of the parties is controlling. There does not seem to be any basis for holding that, although a performance of the contract will necessarily and directly benefit the third person, his remedy depends upon an intention on the part of the parties to the contract that he shall have the right to sue thereon. While the intention of the parties controls in the creation of rights under the contract, and in determining the things required by the contract to be done by the parties, it would seem that, once the right is created or the duty is imposed in favor of the third person, the law furnishes the remedy, regardless of the intention of the parties in respect thereof.
>
> It is to be borne in mind that the parties are presumed to intend the consequences of a performance of the contract. That which is contemplated by the terms of the contract is 'intended' by the parties. 'The distinction between the motive which leads a person to enter into a contract, and the intention deducible from the terms of the contract as it is written, is a very clear one.'... (citing cases).
>
> Clearly, the bond in this case was 'intended' to directly benefit the materialmen, as that expression is above defined. They, therefore, are entitled to maintain this action.

These two Utah cases are in accord with the majority of decisions as reflected by the following authorities and with Rule 17(a).

Rule 17(a) provides in part "every action shall be prosecuted in the name of the real party in interest." Plaintiffs are the real parties in interest.

> The general rule which permits a third person for whose benefit a contract is made to enforce the contract enables a person not named in the bond, but for whose benefit the bond was given to bring an action to enforce rights under the bond. (12 AmJur 2d, Bonds Par. 39)
>
> Where such a bond in its entirety, is consistent with an intention that a third party and others in a like position should have the right to sue thereon, that right will be enforced. (11 CJS Bonds Par. 106)
>
> As a general rule...although the state is the only one named as obligee and there is no express provision giving third persons rights thereunder, and notwithstanding the absence of privity of contract between the principal contractor and such persons... such persons may sue on the bond. (81 CJS States, Par. 119)
>
> In a proper case a third person, for whose benefit or protection a contract has been made by a municipal corporation with a private corporation or company, may maintain an action thereunder in his own name. Under this rule a recovery of damages has been allowed and sustained in favor of: An abutting landowner... (63 CJS Municipal Corporations, Par. 1026)
>
> ...the action should be brought in the name of the real party in interest. Neither the county nor the commissioners thereof... are necessary parties to an action...against the surety. (20 CJS Counties, Par. 205)

Some authorities have even gone so far as to hold that the named obligee cannot sue and that "the loss or burden falls upon the property owners, and the municipality cannot recover therefor, either as trustee for them or on its own account, upon the bond of the contractor." (17 AmJur.2d, Contractors; Bonds, Par. 125)

Travelers cites a lower court Connecticut decision.[5] All that case held was that as a matter of suretyship law, a bonding company cannot be liable if there is no showing that the principal is liable. That situation does not exist in the case at bar since the lower court found all principals and their surety liable and expressly found that time for performance had expired. (Findings, Nos. 3, 4, 6, and 8; Tr. 123) As stated above, there need not be a "call" for the principals and the surety to be liable for their breach of obligation to perform by a stated date. (supra p.10)

Travelers states (p.15 and 16) that there has been an extension of time for performance. There is no evidence thereof and such a contention is in direct contradiction of Findings, Nos. 3, 4, 6 and 8. (Tr. 123)

Damages

Travelers complains (p.18) that the award of $7,200 plus interest was not supported by the evidence, arguing that the $7,200 paid did not coincide with Fleck's testimony as to the $8,750 value of the land without the agreed improvements. Those are not comparable figures. Eight Thousand Seven Hundred Fifty Dollars, being the residual value of the land, would never be

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5 Star Contracting Corp. v. Manway Construction Co., Inc. (1973) 32 Conn.Supp. 64, 337 A.2d 669

an ultimate damage amount, but rather, would only be a factor in computing the amount of damage. The $8,750 sould be deducted from the value of the property had the improvements been put in, which was $70,000 (two dollars a foot for 35,000 square feet) (Tr.153). By subtracting the residual value of $8,750 from $70,000, damages would be in the amount of $61,250. The court awarded only that portion thereof which was reflected by the out-of-pocket payments made by plaintiffs ($7,200 plus interest). Travelers can hardly complain that the court recognized only a portion of the damages to which one of the plaintiffs testified.

Travelers then argues (p.19) that there was no testimony relating to the $7,200 actually paid out of pocket by plaintiffs. Exhibits 10P and 11P show said payments and, based thereon, the court found in Finding No.7 (Tr.123) that said payments had been made. In Finding No.9 (Tr.123) the court found that plaintiffs suffered damage in the amount of $7,200 plus interest. Such findings, being supported by the evidence, are binding upon this court.

Travelers next argues (p.19) that since the property without improvements is worth $8,750; since plaintiffs paid only $7,200 of the $36,000 called for by the contract of purchase; since the sellers agreed that until the bond improvements were put in the remaining balance of the purchase price need not be paid, plaintiffs therefore suffered no damage. This illogical conclusion arises from Travelers' ignoring the fact that since the improvements were not put in, the land was not worth saving. Since the $8,750 present value was much less than the remaining $28,800 balance of the contract price and much less than the outstanding liens, the plaintiffs minimized their losses by not making any further investment to either pay off the remaining balance of the contract or to discharge existing liens. As the court found,

> Defendants have abandoned their plans to develop the subdivision and to install the improvements. Plaintiffs could have protected their ownership interests as contract buyers against the lien created by Exhibit 6P and would have done so had the lots had sufficient value. The failure to install improvements caused the lots to have insufficient value to warrant further investment of funds by plaintiffs, and further investments would have been uneconomic. The abandonment of the subdivision by defendants caused plaintiffs to lose interest in their contract and to lose title to the lots. Plaintiffs' damage acrued prior to the time they determined not to make further investments in the lots and thereby lost title thereto. Plaintiffs minimized their losses by not making any further investment. (Finding No.15)

Travelers argues (p.20) that there is no evidence relating to the cost of improvements and cites the Morro case as authority that decrease in value of property is not the proper measure of damages. As pointed out above, the bond in the Morro case specifically provided that the bond should be used to "fully reimburse and repay the county...outlay and expense which it may incur in making good any default." The indenture in the case at bar did not provide that the county should be reimbursed for its expenses in installing the improvements in case of default, but merely stated:

> Principals hereby agree to cause the various improvements...to be installed on or before two years from recordation of the said final plat.

The factual differences make the Morro case unpersuasive here.

Plaintiffs' Damages Resulted From Defendants' Failure to Install Improvements

Travelers recites (p.21) that plaintiffs were only contract purchasers and thus only equitable owners, and that they knew of the existance of prior liens, and that the plaintiffs lost their interest in the land by virtue of the foreclosures of the prior liens. With all of this we agree. Travelers ignores, however, the Finding of Fact, No. 15 (Tr.124) quoted above, finding that the reason that title was lost was that defendants having defaulted, the land was not worth protecting and plaintiffs minimized their losses by not making further investments. Travelers' argument that plaintiffs were only contract purchasers seems irrelevant. Travelers' argument that "The lack of improvements did not cause plaintiff's loss--the trust deed sale did" is contrary to the finding of the court in Finding 15 that "the failure to install improvements caused the lots to have insufficient value to warrant further investment and further investments would have been uneconomic. The abandonment of the subdivision by defendants caused plaintiffs to lose interest in their contract and to lose title to the lots." Those findings are controlling here.

Travelers recites (p.22) that "notice of default was on the record prior to (plaintiffs) recording their purchase contract." The notice of default was not of record, however, prior to the plaintiff's entering into the earnest money agreement in

1971 (Finding No. 11, Tr.124), nor was it of record prior to plaintiffs' paying $7,200.

"Impossibility" Is No Defense (Specific Performance is Not Sought)

Travelers states (p.23) that the whole subdivision as planned and bonded has now been changed so that it is now impossible to make the improvements that Travelers guaranteed would be installed and that, furthermore, there is a new owner who might not permit Travelers to enter to install the improvements. Travelers concludes therefrom that this somehow excuses it from breach of its guarantee that the improvements would have been installed by 1972.

We reiterate that the findings are to the effect that had Travelers and its principals performed as agreed there would have been no change of title and, therefore, no "impossibility."

Present impossibility, if it is indeed "impossible," is hardly a tenable defense to be relied upon by the bonding company which guaranteed that improvements would have been installed long before. It is actually irrevelant whether or not improvements can now be installed because no one is seeking specific performance, but rather damages.

The Oklahoma case[6] cited by Travelers on impossibility as a defense held that a railroad, which had entered into a lease

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6 Kansas, Oklahoma & Gulf Railway Co. v. Grandland Grain Co. (Okl.1967) 434 P.2d 153

which provided that the railroad would, during the term of the lease, transport lessee's grain, was excused from future performance by virtue of the condemnation of the line for a dam site. This is hardly authority for excusing failure to perform prior to the impossibility.

The U.S. Supreme Court case cited as to impossibility[7] is likewise no authority for excusing a breach of contract prior to the existence of the impossibility. In that case there was a charter party for use of a ship which was requisitioned by the British Admiralty for use in World War I. The court merely held that future performance was excused.

CONCLUSION

Travelers seeks to avoid liability on a bond it issued, guaranteeing that improvements would be installed, on the various technical grounds discussed above and argues that plaintiffs should look to their defunct seller instead of to Travelers. They are both liable. Travelers received its premium for executing the bond and should not now avoid the liability it assumed.

Respectfully submitted,

John W. Lowe
Lowe & Hurley
Attorney for Respondents

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7 Texas Co. v. Hogarth Shipping Co. Ltd. (1921) 41 S.Ct. 612, 256 U.S. 619